

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GERALD ANTHONY FOGGY,

Petitioner,

vs.

E. VALENZUELA, Warden,

Respondent.

CASE NO. 12-CV-2633-LAB (BGS)

**ORDER DENYING  
PETITIONER'S MOTION TO  
APPOINT COUNSEL**

On April 26, 2013, Petitioner Gerald Anthony Foggy, a state prisoner proceeding *pro se* in his petition for writ of habeas corpus, filed a motion to appoint counsel. (Doc. No. 13.) For the reasons set forth below, the Court **DENIES WITHOUT PREJUDICE** Petitioner's motion for appointment of counsel.

Petitioner argues the Court should appoint him counsel for three reasons: (1) he is not sufficiently trained in legal matters; (2) he is ignorant as to how to proceed with the case; and (3) he lacks knowledge of how to legally represent himself. (Doc. No. 13.)

There is no constitutional right to counsel in federal habeas corpus actions by state prisoners. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991); *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986); *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C. § 2254 may obtain representation whenever the Court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B) (West Supp. 2005); *Terrovona v. Kincheloe*, 912 F.2d 1176, 1181

1 (9th Cir. 1990); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir. 1984); *Hoggard v. Purkett*,  
 2 29 F.3d 469, 471 (8th Cir. 1994).

3 The interests of justice require appointment of counsel when the Court conducts an  
 4 evidentiary hearing on the petition. *Terrovona*, 912 F.2d at 1177; *Knaubert*, 791 F.2d at 728;  
 5 *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir. 1994); Rule 8(c), 28 U.S.C. foll. § 2254. When  
 6 no evidentiary hearing is necessary, the appointment of counsel is discretionary. *Terrovona*,  
 7 912 F.2d at 1177; *Knaubert*, 791 F.2d at 728; *Abdullah*, 18 F.3d at 573.

8 In the Ninth Circuit, “[i]ndigent state prisoners applying for habeas relief are not  
 9 entitled to appointed counsel unless the circumstances of a particular case indicate that  
 10 appointed counsel is necessary to prevent due process violations.” *Chaney*, 801 F.2d at 1196;  
 11 *Knaubert*, 791 F.2d at 728-29. The Eighth Circuit has developed case law useful in determining  
 12 whether due process requires appointment of counsel. In the Eighth Circuit, a due process  
 13 violation may occur in the absence of counsel if the issues involved are too complex for the  
 14 petitioner. *Hawkins v. Bennett*, 423 F.2d 948, 950 (8th Cir. 1970). Factors considered in  
 15 determining the complexity of the legal issues include “the legal complexity of the case, the  
 16 factual complexity of the case, and the petitioner’s ability to investigate and present his claim.”  
 17 *Abdullah*, 18 F.3d at 573 (citing *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990));  
 18 *Hoggard*, 29 F.3d at 471; *Boyd v. Groose*, 4 F.3d 669, 671 (8th Cir. 1993); *Smith v. Groose*,  
 19 998 F.2d 1439, 1442 (8th Cir. 1993); *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (8th Cir.  
 20 1986). In addition, courts may consider “any other relevant factors” such as whether the  
 21 petitioner has such limited education that he or she is incapable of presenting his or her claims.  
 22 *Abdullah*, 18 F.3d at 573; *Hawkins*, 423 F.2d at 950.

23 Petitioner’s request for counsel is denied without prejudice because the circumstances  
 24 of this case do not indicate that the issues involved are so complex that counsel is necessary  
 25 to prevent due process violations. *Chaney*, 801 F.2d at 1196; *Knaubert*, 791 F.2d at 728-29;  
 26 *Hawkins*, 423 F.2d at 950. Petitioner has thus far been able to articulate his claims and  
 27 adequately represent himself. Under these circumstances, a district court does not abuse its  
 28 discretion by denying a state prisoner’s request for appointment of counsel as it is simply not

warranted by the interests of justice. *See LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987).

The Court also notes that “[w]here the issues involved can be properly resolved on the basis of the state court record, a district court does not abuse its discretion in denying a request for court-appointed counsel.” *Hoggard*, 29 F.3d at 471; *McCann v. Armontrout*, 973 F.2d 655, 661 (8th Cir. 1992); *Travis v. Lockhart*, 787 F.2d 409, 411 (8th Cir. 1986) (per curiam) (holding that district court did not abuse its discretion in denying § 2254 habeas petitioner’s motion for appointment of counsel where allegations were properly resolved on basis of state court record). Here, Petitioner challenges his conviction on the basis of the prosecutor’s allegedly improper peremptory challenge against a prospective African American juror. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Respondent has provided the Court with the Clerk’s and Reporter’s transcripts from Petitioner’s San Diego Superior Court Case No. SCN268712. At this stage of the proceedings, it appears the Court will be able to properly resolve the issues involved on the basis of the state court record.

While the assistance that counsel provides is valuable, the court in *Knaubert* noted that “unless an evidentiary hearing is held, an attorney’s skill in developing and presenting new evidence is largely superfluous; the district court is entitled to rely on the state court record alone.” 791 F.2d at 729 (citing *Sumner v. Mata*, 449 U.S. 539, 545-57 (1981), and 28 U.S.C. § 2254(d)).<sup>1</sup> Because this Court denies Petitioner’s motion for appointment of counsel, it must “review the record and render an independent legal conclusion.” *Id.* Moreover, because the Court does not appoint counsel, it must “inform itself of the relevant law. Therefore, the additional assistance provided by attorneys, while significant, is not compelling.” *Id.*

“The procedures employed by the federal courts are highly protective of a pro se petitioner’s rights. The district court is required to construe a pro se petition more liberally than it would construe a petition drafted by counsel.” *Knaubert*, 791 F.2d at 729 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding *pro se* complaint to less stringent standard) (per

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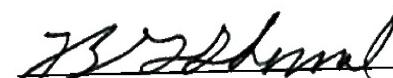
<sup>27</sup> <sup>28</sup> <sup>1</sup>When a *pro se* petitioner presents a palpable claim that state court factual findings are erroneous, this Court properly exercises its discretion to hold an evidentiary hearing. In such circumstances, counsel will be appointed. *See Rule 8, 28 U.S.C. foll. § 2254*. Petitioner has not made such a showing here.

1 curiam)); *Bashor*, 730 F.2d at 1234. On the basis of the first amended petition, filed *pro se*,  
 2 it appears that Petitioner has a good grasp of this case and the legal issues involved. (See Doc.  
 3 No. 5.) The first amended petition was pleaded sufficiently to warrant this Court's order  
 4 directing Respondent to file a responsive pleading. This Court will likely not require that  
 5 Petitioner file further pleadings.<sup>2</sup>

6 In sum, the Court finds that Petitioner's arguments regarding his lack of legal  
 7 knowledge and uncertainty about how to proceed with the case do not warrant the appointment  
 8 of counsel at this time. Petitioner's arguments are not based on the complexity of the issues  
 9 involved but rather on the general difficulty of litigating *pro se*. See *Wilborn v. Escalderon*,  
 10 789 F.3d 1328, 1331 (9th Cir. 1986) (noting that, "If all that was required to establish  
 11 successfully the complexity of the relevant issues was a demonstration of the need for  
 12 development of further facts, practically all cases would involve complex legal issues.").  
 13 Accordingly, Petitioner's request for appointment of counsel is **DENIED WITHOUT**  
 14 **PREJUDICE**.

15 **IT IS SO ORDERED.**

16  
 17 DATED: June 11, 2013

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 19   
 20 Hon. Bernard G. Skomal  
 U.S. Magistrate Judge  
 United States District Court

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 26       <sup>2</sup>Although Petitioner may file a traverse to Respondent's answer, Rule 5, and the general  
 27 procedure set up by the rules following § 2254, "does not contemplate a traverse to the answer, except  
 28 under special circumstances." Rule 5, 28 U.S.C. foll. § 2254 advisory committee notes. "In actual,  
 practice, the traverse tends to be a mere pro forma refutation of the [answer], serving little if any  
 expository function. In the interests of a more streamlined and manageable habeas corpus procedure,  
 it is not required except in those instances where it will serve a truly useful purpose." *Id.*